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No. 06-1175

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent objects to Petitioner's First Question Presented as framed. Petitioner claims that an issue for certiorari review is "whether overbreadth standing no longer allows a facial challenge to any other provision of a sign ordinance that has not been directly applied to the applicant."

Respondent objects to this formulation of the issue. As set forth in this Response, the overbreadth doctrine has *never* allowed a facial challenge to provisions of a sign ordinance, or any other law, unless a litigant has suffered an injury-in-fact under the particular provision that it seeks to challenge.

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited by Petitioner, Respondent includes the following:

(1) Article III, Section 2 of the United States Constitution:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) Article III, Section 47-22.11, City of Fort Lauderdale, Code of Ordinances (the "Sign Regulations").

STATEMENT OF THE CASE

I. Overview Of The Case

Petitioner Granite State Outdoor Advertising, Inc. ("Petitioner" or "Granite State") seeks review of a decision by the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") which affirmed the United States District Court's (the "District Court") dismissal of Petitioner's Complaint and Request for Injunctive Relief (the "Complaint") due to lack of standing. In the proceedings before the District Court and the Eleventh Circuit, Petitioner sought to utilize the limited overbreadth exception to facially challenge the City of Fort Lauderdale, Florida's (the "City" or "Fort Lauderdale") comprehensive sign regulations (the "Sign Regulations"), which

consist of eleven multi-part sections spanning twenty-six pages. The Eleventh Circuit affirmed the District Court's dismissal of the Complaint on the ground that the Petitioner failed to establish that it had standing to facially challenge the City's Sign Regulations in their entirety.

In denying Granite State's attempt to utilize the facial overbreadth doctrine to challenge the entirety of comprehensive Sign Regulations, the Eleventh Circuit continues to follow this Court's long-standing admonition that the overbreadth exception is one of limited application and is "manifestly, strong medicine" to be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In so adhering to this Court's precedent, the Eleventh Circuit has recently decided a series of cases which have clarified the indispensability of Article III's constitutional standing requirements and which have put an end to ever-increasing attempts to transform the facial overbreadth doctrine into an instrument of commercial gain under the guise of a First Amendment challenge.

Contrary to Petitioner's assertions, the Eleventh Circuit's recent decisions in *Granite State Outdoor Advertising v. City of Clearwater*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004); *Tanner Adver. Group, L.L.C. v. Fayette County*, 429 F.3d 1012 (11th Cir. 2005); *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), and the unpublished decision at issue in the Petition, are consistent with the development of this Court's jurisprudence regarding both the constitutional limits on standing as well as the narrow overbreadth exception to the prudential limits on standing. These decisions do not limit the First Amendment rights of third party litigants or curtail the facial overbreadth doctrine. Rather, they provide much needed clarification and guidance to federal courts within the Eleventh Circuit which continue to be confronted with cases, such as the one at issue here, filed for the sole purpose of facially invalidating comprehensive land development regulations with the goal of forcing local governments to permit billboard structures in locations where they are otherwise

prohibited. For these reasons, as more fully set forth below, the Petition for Writ of Certiorari filed by Granite State should be denied.

II. Factual Background

Because the Petition seeks review of the Eleventh Circuit's decision affirming the grant of a motion to dismiss, the facts at issue are limited to those set forth in the Complaint and to the City's Sign Regulations, which were attached as an exhibit to the Complaint.

On June 30, 2003, Granite State submitted nine sign permit applications to the City of Fort Lauderdale. (10a). The applications were referred to the City's Plans Examiner, who advised Granite State that the applications would be denied pursuant to Section 47-22.11(E) of the City's Sign Regulations, which prohibits "outdoor advertising display signs and billboards." (10a). Section 47.22.2(A)(15) defines "outdoor advertising display" as "[a]n off-premise, outdoor advertising sign, such sign being commonly referred to as a billboard, poster board, or outdoor advertising board." (10a, n.2). Granite State requested a written denial of its applications, and the City formally denied the applications by letter dated June 30, 2003, the same date that the applications were submitted. (11a). The June 30, 2003 denial letter confirmed that the applications were rejected based on the City's prohibition on "outdoor advertising display signs and billboards." (11a).

III. Proceedings Below

Granite State subsequently filed a thirteen count Complaint against the City of Fort Lauderdale. (11a-12a). The Complaint was not limited to Section 47-22.11(E) under which the permits were denied. Rather, Granite State sought to challenge the constitutionality of the City's Sign Regulations *in their entirety*, both facially and as applied to Granite State and to third parties, under the overbreadth doctrine. (3a-4a, 11a). Granite State sought, *inter alia*, to challenge the Sign Regulations' alleged lack of procedural safeguards with respect to permitting

requirements, and also alleges that the regulations granted an impermissible level of discretion to City officials to approve or deny signs.

Relying upon the Eleventh Circuit's decision in *Clearwater*, the District Court granted the City's motion to dismiss the Complaint, concluding that Granite State failed to establish that it had standing to facially challenge any provision of the Sign Regulations other than Section 47-22.11(E), under which its permits had actually been denied. (1a, 16a). Citing *Clearwater*, the District Court further held that "Granite State's standing in the present matter is limited to challenging the constitutionality of the subsection of the Sign Ordinance under which its applications were denied, facially, as applied to it, and as applied to others under the overbreadth doctrine." (15a). The District Court concluded that the only section Granite State had standing to challenge, *i.e.* Section 47-22.11(E), was constitutional and survived all constitutional challenges asserted by Granite State. (2a). The District Court noted that "taking as true the allegations of the Complaint and the attached Sign Ordinance, 'no relief could be granted under any set of facts that could be proved consistent with th[ose] allegations.'" (17a) (quoting *Blackstone v. Ala.*, 30 F.3d 117, 120 (11th Cir. 1994)).

Granite State appealed the District Court's order, and in its initial brief, relied upon the Eleventh Circuit's panel decision in *Tanner Adver. Group, L.L.C. v. Fayette County*, 411 F.3d 1272, *vacated by* 429 F.3d 1012 (11th Cir. 2005), which disagreed with (and declined to follow) the Eleventh Circuit's prior decision in *Clearwater*. Subsequent to the parties' initial briefing, however, the Eleventh Circuit vacated *Tanner* and issued a new opinion *en banc*: *Tanner Adver. Group, L.L.C. v. Fayette County*, 451 F.3d 777 (11th Cir. 2006) (en banc). (3a). Shortly thereafter, the Eleventh Circuit issued its decision in *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006), in which it addressed the facial overbreadth doctrine and its relationship to Article III's case or controversy requirement. The Eleventh Circuit then directed the parties in the case to submit

supplemental briefs regarding the standing issue in the light of its *en banc* decision in *Tanner* and its decision in *CAMP*. (3a).

In its supplemental brief, Granite State maintained its challenge to provisions of the Sign Regulations, other than Section 47-22.11(E) under which its permits were denied, on the grounds that these other provisions: (1) lack required procedural safeguards such as a limit to the amount of time the City may take to grant or deny a sign permit and a mechanism for judicial review of a denied sign permit application; or (2) grant unbridled discretion to City officials to permit certain types of signs; or (3) constituted an unlawful prior restraint. The lengthy list of provisions that Petitioner sought to challenge was set out in the Eleventh Circuit's decision. (3a).

In upholding the District Court's dismissal, the Eleventh Circuit noted that before the issuance of the *en banc* decision in *Tanner*, Granite State had based its appeal on the "erroneous notion that the denial of its applications for sign permits enabled it to challenge, under the overbreadth doctrine, *any* provision of the Sign Ordinance as a violation of the First Amendment." (5a) The court noted that the District Court had correctly concluded that such an argument was foreclosed by the Eleventh Circuit's decision in *Clearwater*, and that "[a]s a result of the final decisions in *Tanner* and *CAMP*, the arguments of Granite State now collapse." (5a).

The Eleventh Circuit went on to address the more specific assertions raised by Granite State in its supplemental brief. The court held that Granite State did not have standing to challenge the permitting requirements and procedures because Granite State was ineligible to even apply for a permit to construct outdoor advertising displays which were prohibited and which were never permitted under the Sign Regulations. (6a). The court noted that Granite State was not subject to the wide array of other allegedly unconstitutional provisions that it had cited as granting unbridled discretion, such as those that could be exempted from regulation because they convey a warning,

because it had only submitted applications for outdoor advertising displays. (3a, 6a).

The court further concluded that Granite State did not have standing to challenge alleged prior restraints that did not affect Granite State because it could not meet the burden of establishing that the challenged provision pertained to its activity. (7a) (internal citations omitted). The court noted that in order to survive a motion to dismiss, Granite State had the burden of alleging "injury resulting from the defendant's conduct," and that it had failed to allege facts that established standing to challenge the allegedly unconstitutional prior restraint. (7a) (*quoting Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003)).

Finally, the Eleventh Circuit held that Granite State lacked standing to challenge the provision of the sign ordinance which exempted certain items, such as flags, government signs, and holidays decorations from the exemption provisions. (8a). The court reasoned that the injury that Granite State suffered, *i.e.* from being denied a permit under the categorical ban on billboards, could not be redressed by challenging these exemptions. (8a). The court thus concluded that Granite State did not have standing to challenge these exemptions because "it cannot establish that its injury will be redressed by a favorable decision." (8a). Accordingly, the Eleventh Circuit affirmed the District Court's dismissal of the Complaint. (8a).

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision In This Case Does Not Conflict With The Decisions Of This Court Or With The Decisions Of Other Circuit Courts.

Petitioner contends that the *Fort Lauderdale* decision "epitomizes" the conflict among the Circuits with regard to the overbreadth doctrine. (5). The Petition is not limited to other circuit courts, however, but also asserts alleged conflicts with this Court's prior case law. Accordingly, in this Response, the City will first address the general standing requirements, and

the Petitioner's contention that the *Fort Lauderdale* decision, and other recent Eleventh Circuit decisions, curtail the facial overbreadth doctrine and conflict with this Court's decisions on standing and the overbreadth doctrine. Respondent will then address the alleged conflicts with other Circuits.

A. Overview of the Standing Requirements.

Article III, Sec. 2 of the United States Constitution mandates that there be an actual "case" or "controversy" before a federal court may decide a case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In ensuring that Article III's case or controversy requirements are met, this Court has identified three *constitutional* requirements for standing: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Id.* Collectively, these three criteria are referred to as the "injury-in-fact" requirement. The constitutional injury-in-fact requirement is accompanied by prudential limitations, "which [embody] 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004) (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal citations omitted)). Together, these constitutional and prudential requirements make up the two "strands" of the doctrine of *standing*. *Id.* (citing *Lujan*, 504 U.S. at 559-62).

One prudential limitation is the "general prohibition on a litigant's raising another person's legal rights." *Allen*, 468 U.S. at 751. An exception to this prudential limitation on standing is the overbreadth doctrine which applies in First Amendment cases involving non-commercial speech. The overbreadth doctrine permits a litigant to raise the rights of third parties where there is a *substantial* danger that a statute constitutionally applied to the litigant may be unconstitutionally applied to others not before the court. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

B. The *Fort Lauderdale* Decision is Based on the Eleventh Circuit's Recent Decisions in *Clearwater*, *Tanner* and *CAMP*.

The *Fort Lauderdale* decision at issue in the Petition is based on two recent decisions of the Eleventh Circuit which addressed standing in the context of challenges to comprehensive sign regulations: *Clearwater*, decided in 2003, and *Tanner*, decided *en banc* in 2006. In addition, *Fort Lauderdale* is based on the Eleventh Circuit's recent decision in *CAMP* in which it clarified the relationship between the Article III injury-in-fact requirement and facial overbreadth challenges.

Beginning with *Clearwater*, the Eleventh Circuit explicitly held that even a litigant who intends to raise the First Amendment rights of third parties bringing facial overbreadth challenges must *first* demonstrate a cognizable injury-in-fact as part of Article III's case or controversy requirement. In *Clearwater*, Granite State filed an eleven-count complaint against the City of Clearwater, Florida, alleging that its comprehensive sign regulations were unconstitutional on numerous grounds. The complaint was not limited to the validity of Section 3-1806.B, under which Granite State's permits were denied. Instead, Granite State mounted a shotgun-style attack, noting every conceivable constitutional infirmity of Clearwater's comprehensive sign regulations. Although the district court determined that Granite State, which had never appealed the denial of its permits, did *not* have overbreadth standing to challenge the lack of time limits in the appeal provisions of the development review procedures (Article 4), the district court noted that it was "constrained" to find that Granite State did have standing to mount a facial challenge to Article 3, Division 18, which contained numerous other provisions related to sign usage, and not just the provision under which Granite State's permits were denied. *Granite State Outdoor Adver. Co. v. City of Clearwater, Fl.*, 213 F. Supp. 2d 1312, 1322 (M.D. Fla. 2002).

On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that the district court had "misapplied the overbreadth doctrine" with regard to Article 3, Division 18 and that Granite State lacked standing to facially challenge either Article 3, Division (18) (the sign regulations) or Article 4 (the development review procedures). *Clearwater*, 351 F.3d at 1115, 1117. Noting that the overbreadth doctrine is not an exception to the *constitutional* standing requirements, the Eleventh Circuit held that Granite State's only injury-in-fact resulted from Section 3-1806.B, which contained completely content-neutral height, size, and location requirements, and that Granite State's ability to mount a facial challenge was correspondingly limited to that particular provision. *Id.* at 1117.

Subsequently, the Eleventh Circuit issued its *en banc* decision in *Tanner*. In *Tanner*, an outdoor advertising company applied for eight applications to construct signs that were 50 feet in height and 672 feet in size. 451 F.3d at 781. The applications were denied on the same day pursuant to Section 1-43 of Fayette County, Georgia's sign ordinance, which prohibited off-premise signs more than three feet above ground level and greater than two horizontal feet and two vertical feet in width. *Id.* at 781. Tanner moved to enjoin the enforcement of Section 1-43 and several other provisions of Fayette County's sign ordinance. *Id.* at 781. The district court denied injunctive relief on the ground that Section 1-43 was constitutional and that Tanner lacked standing to challenge the other provisions of the ordinance. *Id.* at 783. A panel of the Eleventh Circuit reversed, disagreeing with its prior *Clearwater* decision and concluding that Tanner had standing under the overbreadth doctrine to challenge the other provisions of the ordinance. *Id.* at 780. The Eleventh Circuit granted a petition for rehearing *en banc* and vacated the panel decision. 429 F.3d 1012 (2006). On rehearing *en banc* the Eleventh Circuit upheld the district court's decision that Tanner lacked standing to challenge provisions of the ordinance that were not applicable to it. Citing *Clearwater*, the *en banc* court noted that a Plaintiff must meet

each of the three injury-in-fact requirements (*id.* at 791), and further noted that each element of the constitutional injury requirements are "indispensable." *Id.* (citing *Lujan*, 504 U.S. at 561).

Shortly after issuance of *Tanner en banc*, the Eleventh Circuit issued its decision in *CAMP* to clarify the proper use of the facial overbreadth doctrine. 451 F.3d 1257. In *CAMP*, the plaintiff sought to challenge numerous provisions of the City of Atlanta's festival ordinance which required organizations to acquire permits prior to holding an outdoor festival in the City. Plaintiff contended that a party who suffered injury under one provision of the Ordinance had standing to challenge any provision of the ordinance. 451 F.3d at 1270. The Eleventh Circuit rejected this argument, clarifying that "[t]he overbreadth doctrine *does not relieve a plaintiff of the burden to prove constitutional standing*, which requires that 'the plaintiff himself has suffered some threatened or actual injury. . . .'" *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). The court concluded that "[u]nder the overbreadth doctrine, CAMP may mount a faical challenge—as opposed to an as-applied challenge—to provisions of the Festivals ordinance *that affect its activities.*" *Id.* (emphasis added).

The *Fort Lauderdale* decision, which is the subject of the current Petition, follows *Clearwater*, *Tanner*, and *CAMP*. In *Fort Lauderdale*, the Eleventh Circuit *did not* hold that Granite State was prohibited from mounting a facial overbreadth challenge or that it could not under any circumstances raise the rights of third-party litigants. Rather, consistent with its prior decisions, the court upheld that the District Court's determination that Granite State could mount a facial overbreadth challenge only to those provisions of the Sign Regulations that "affect its activities" (*i.e.* 47-22.11(E)).

C. The *Fort Lauderdale* Decision Does Not Conflict with this Court's Prior Decisions with Regard to the Injury-in-Fact Requirement or the Facial Overbreadth Doctrine.

In its Petition, Granite State ignores its failure to establish the constitutionally required injury-in-fact, and instead attempts to cast the Eleventh Circuit's decision as one which places the overbreadth doctrine "under siege." (9). Contrary to Petitioner's assertion that the *Fort Lauderdale* decision, as well as the three prior decisions upon which it is based, have somehow eviscerated a First Amendment speaker's right to mount a facial overbreadth challenge, these decisions are entirely in accordance with this Court's prior decisional law.

1. The *Fort Lauderdale* decision is consistent with this Court's decisions with regard to the constitutionally required injury-in-fact.

Granite State begins, in Section I of the Petition, with the fundamentally erroneous assertion that a plaintiff need not establish the *constitutionally* mandated injury-in-fact in order to bring a facial overbreadth challenge. According to Granite State:

> [w]hile a plaintiff must generally demonstrate that it has suffered an injury-in-fact . . . the Supreme Court created an exception to these general rules of standing . . . where this Court noted that the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected.

(5). This assertion is simply incorrect. Respondent is unaware of any decision by this Court which holds that *constitutional* requirements may be ignored or waived. Petitioner conflates the prudential limitations on standing, which may be relaxed under certain limited circumstances, with the constitutional injury-in-fact requirement, which must always be met.

This Court has consistently held that although the judicially-created prudential requirements on standing may be relaxed under some circumstances, the requirements of Article III can never be waived or ignored, and that a plaintiff seeking to make an overbreadth challenge must first demonstrate an *injury-in-fact*. The overbreadth doctrine, which is judicially created, cannot alter the requirements of standing, under Article III, because the Judiciary *cannot abrogate the Constitution. Gladstone Realators v. Village of Bellwood*, 441 U.S. 91, 100 (1979). *See also e.g. Virginia v. American Bookseller Ass'n*, 484 U.S. 383, 392-93 (1988) (noting that the injury-in-fact requirement had been met where law was "aimed directly at plaintiffs" who would have to take "significant and costly compliance measures or risk criminal prosecution). In discussing various exceptions to the prudential limitation on standing, this Court has noted that "[o]f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth*, 422 U.S. at 501.

This Court's decision in *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) illustrates the indispensability of the injury-in-fact requirement. In *Munson*, the Court allowed a for-profit company to facially challenge a Maryland statute that prohibited charitable organizations from paying or agreeing to pay expenses exceeding 25% of an amount raised in a fundraising activity. This Court reiterated, however, that "[t]he first element of the standing inquiry that Munson must satisfy in this Court is the "case" or "controversy" requirement of Art. III. . . ." *Id.* at 954. This Court concluded that Munson had suffered an injury-in-fact because its contracts called for payment in excess of 25% of the funds raised for a given event and subjected it to civil restraint and criminal penalty under the statute. *Id.* at 954-55. Although Munson, as a for-profit company (non-charity), did not suffer a *constitutional* violation pursuant to the First Amendment, this Court held that Munson could raise the First Amendment rights of third parties

not before the court under the overbreadth doctrine because it had met the necessary injury-in-fact requirement: "[t]he crucial issues are whether Munson satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case." *Id.* at 958.

Accordingly, this Court has recognized that the injury-in-fact requirement is a necessary prerequisite to any facial overbreadth challenge, and *Fort Lauderdale* is entirely consistent with this Court's prior decisional law with regard to Article III standing requirements.

2. *Fort Lauderdale* is also consistent with this Court's prior decisions regarding proper application of the overbreadth doctrine.

This Court has recognized that "[a]pplication of the overbreadth doctrine is, manifestly, strong medicine" which has been "employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Five months prior to the Eleventh Circuit's *Clearwater* decision, this Court issued its opinion in *Virginia v. Hicks*, 539 U.S. 113 (2003), in which this Court admonished that "there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially, to constitutionally unprotected conduct." *Id.* at 119. This Court noted that even the "chilling effect" of a law which is actually overbroad, "cannot justify prohibiting all enforcement of that law—particularly a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" *Id.* This Court went on to re-affirm that a law's overbroad application to protected speech must be "substantial" before it is invalidated:

> To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly

> legitimate applications before applying the "strong medicine" of overbreadth invalidation.

Id. at 119-120 (internal citations omitted). *Hicks* is consistent with this Court's prior decisions with regard to facial overbreadth and the necessity that a statute be "substantially overbroad." *See, e.g., Broadrick*, 413 U.S. at 613; *New York v. Ferber*, 458 U.S. 747, 773 (1982). Moreover, as noted by the Eleventh Circuit in *CAMP*, "[t]he Supreme Court has refused to consider challenges to provisions of a statute where '[e]xamination of the record reveals that no party has standing to challenge the provisions.'" *CAMP*, 451 F.3d at 1273 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 233 (1990).

Hicks and other recent decisions of this Court also reveal an increased recognition that as-applied challenges are the normal and appropriate means of vindicating constitutional violations, and that facial overbreadth challenges are to be reserved for *extreme circumstances*. *See, e.g., Hicks*, 539 U.S. at 124 (noting that applications of loitering policy that violate the First Amendment can be remedied through as-applied challenges); *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) (holding that provision of content-neutral permitting scheme which might allow park district to waive permit requirements would be an abuse that must be dealt with "if and when a pattern of unlawful favoritism appears. . . ."); *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 784 (2004) (noting that individuals denied licenses "remain free to raise special problems of undue delay in individual cases as the ordinance is applied").

In seeking review of the *Fort Lauderdale* decision, which is based upon *Clearwater*, *Tanner*, and *CAMP*, Granite State contends that if it has standing to assert a facial challenge under Section 47-22(E), it must necessarily have standing to assert a facial challenge under the extensive remaining provisions of the Sign Regulations. Granite State bases its contention that it may challenge the City's entire sign permitting scheme on *Broadrick* and *Members of City Council of Los Angeles v.*

Taxpayer's for Vincent, 466 U.S. 789 (1984), as well as an over-extended reading of footnote 11 to this Court's plurality decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

Respondent does not dispute that *Broadrick* and *Taxpayer's for Vincent* are significant decisions applying the overbreadth doctrine in the First Amendment context. In asserting that it may challenge every provision of Fort Lauderdale's Sign Regulations, however, Granite State misapplies and overextends the overbreadth doctrine, and in fact, does damage to it by confusing its proper application. Additionally, Petitioner's assertion of an alleged conflict with *Metromedia* is similarly erroneous. In *Metromedia*, a plurality of this Court held that an outdoor advertising company, whose interests were *primarily* commercial, could challenge those aspects of the ordinance which exempted certain noncommercial speech. 453 U.S. at 504, & n. 11.

Petitioner's assertion of conflict relies upon the often mis-cited footnote 11 in the *Metromedia* plurality decision which states as follows: "[w]e have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." *Id.* at 504, n. 11. This footnote was pure dictum as the plurality had already determined that Metromedia could challenge all aspects of the ordinance "in their own right." *Id.* at 504. Petitioner in this case and many other outdoor advertising companies have attempted to extrapolate from footnote 11 a judicial mandate that a plaintiff may challenge any portion of a land development regulation or a zoning ordinance if any particular section of that regulation implicates the First Amendment. Such an extensive interpretation is nonsensical as aptly noted by one District Judge in the Eleventh Circuit:

> It defies logic and all reasonable interpretation of the language of *Metromedia* . . . where the Supreme Court has simply said that it has not yet determined that an entity with a commercial interest can *never*

> raise a First Amendment challenge to the facial validity of a statute, . . . [to assume] a legal principle that even a slight (*de minimis*) interest in noncommercial speech by a overwhelmingly proportionate commercial speech billboard company [gives] it the right to take up the sword on behalf of noncommercial advertisers. . . .

National Advertising Co. v. City of Miami, 287 F. Supp. 2d 1349, 1362 (S.D. Fla. 2003), *rev'd on other grounds by* 402 F.3d 1329 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1318 (2006). The footnote reference in *Metromedia* must also be read in light of this Court's pre-existing precedent. *See Warth*, 422 U.S. at 499 (noting that "[a] federal court's jurisdiction therefore can be invoked only when the Plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'") (internal citations omitted).

Moreover, such an extension of the overbreadth doctrine to comprehensive Sign Regulations, particularly where the applicant is affected only by a limited portion of those regulations, is contrary to the history of the doctrine's development. Petitioner correctly states that the overbreadth doctrine developed as a means to challenge laws that, by their very generalized nature, swept constitutionally protected activity within their prohibitions. Vagrancy and loitering ordinances are primary examples. *See, e.g., Broadrick*, 413 U.S. at 602 (law generally restricting political activities of state civil service employees); *Thornhill v. State of Alabama*, 310 U.S. 88 (1940) (law prohibiting loitering and picketing). Such statutes, however, traditionally applied to one type of conduct or category of conduct which was defined in such an overly broad way that it swept within its grasp certain constitutionally protected conduct. For this reason, the overbreadth doctrine allowed those who had not been *constitutionally* injured (for instance, one validly arrested for loitering), to mount a facial attack on the statute on behalf of third parties whose First Amendment rights might be inhibited by the potentially broad scope of the regulation at issue.

In contrast, municipal land development regulations and zoning regulations contain numerous separate sections and provisions with very specific applications. In that respect, they are the antithesis of the type of law historically subject to overbreadth challenges. Where those laws were general attempts to prohibit conduct, but do so in an overly broad manner, the type of land development regulations at issue in this case are carefully crafted and represent efforts to regulate all kinds of *structures*.[1]

Moreover, contrary to Petitioner's assertion, this case does not fall within that category of cases which involves the vesting of unbridled discretion to officials. (8). Petitioner cites *City of City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (1988) in an attempt to cast the Sign Regulation at issue into the form of a *licensing scheme* under which a plaintiff need not apply for a *permit* prior to bringing a facial challenge. Even in such cases, the litigant must establish an injury-in-fact. Nonetheless, *Fort Lauderdale* is distinguishable from a line of this Court's decisions, including *City of Lakewood* and *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), in which the Court determined that litigants may facially challenge licensing schemes which vest the decision-maker with unbridled discretion to restrict First Amendment activity. In the past, this Court has held that a facial challenge was proper where the regulations at issue targeted protected activity such as assembly and parades (*Forsyth*) and permitting for placement of news racks (*Lakewood*). However, in *Lakewood* this Court clarified that not every law which grants discretion to a decision maker is subject to a facial overbreadth challenge. Rather, "[t]he law

1. This Court has further noted in *Hicks* that "rarely if ever will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech. . . ." 539 U.S. at 124. Rather, as the Court noted, in such cases, applications of the policy at issue that violate the First Amendment may be remedied "through as-applied" litigation. *Id.* While sign regulations have some impact on expressive activity, the regulation of property and structures upon which advertising is placed is a matter of land use law to which judicial deference is given.

must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." *Lakewood*, 486 U.S at 759. As an example, this Court stated in *Lakewood* that a law granting discretion in the issuance of *building permits* would not pose the danger of censorship, noting that "such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761.

Significantly, in both *Lakewood* and *Forsyth*, the plaintiff was directly impacted by a regulation which, due to the discretion vested in decision-makers, had the potential to chill First Amendment activity even if it did not chill the First Amendment activity of the Plaintiff. In this case, Petitioner has suffered no injury-in-fact from any provision of the Sign Regulations which allegedly implicates the First Amendment or vests undue discretion. Rather, the provision of the Code under which Petitioner's permits were denied pursuant to the City's prohibition of billboards.

D. The *Fort Lauderdale* Decision is Not in Conflict with Decisions of Other Circuits.

Petitioner contends that "parties asserting First Amendment challenges in the Eleventh and Fifth Circuits are now denied standing to challenge speech restrictions under the overbreadth doctrine while such challenges are allowed elsewhere" and that, as a result, there is a "disparity in treatment by federal courts. . . ." (13). Specifically, Petitioner contends that *Fort Lauderdale* conflicts with decisions of the Sixth, Ninth and Second Circuit Courts of Appeal.[2] However a review of

2. Petitioner names these circuits, but then also cites decisions from the Fourth and First Circuits as well. Petitioner cites *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33, 34 (1st Cir. 1996), in which a billboard company which displayed 46 *non-commercial* signs brought an action to preclude enforcement of an order directing it to take down its signs. The plaintiff in *Ackerley* had

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recent standing decisions reveals that *every* United States Circuit Court which has considered the issue, *including the Second, Third, and Ninth, which Petitioner cites to be in conflict with the Eleventh and Fifth Circuits*, has recognized that the constitutionally mandated injury-in-fact requirements are separate and distinct from the facial overbreadth exception to the prudential limitations on standing, and that even a party seeking to mount a facial overbreadth challenge must demonstrate that he has suffered injury under the challenged provision. *See Farrell v. Burke*, 449 F.3d 470, 498-99 (2d Cir. 2006); *Service Employees Int'l Union, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419, 424-25 (3d Cir. 2006); *Peterson v. National Telecommunications and Information Administration*, 478 F.3d 626, 633-34 (4th Cir. 2007); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois*, 9 F.3d 1290, 1292 (7th Cir. 1993); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 798-99 (8th Cir. 2006); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111-13 (9th Cir. 1999); *National Council for Improved Health v. Donna Shalala*, 122 F.3d 878, 882-83 (10th Cir. 1997). Moreover, a

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(Cont'd)
substantial non-commercial speech interests and was ordered to take down already-standing signs. The plaintiff thus suffered a direct injury and was arguably affected by the alleged constitutional infirmity — that the ordinance impermissibly protected non-commercial on-premises signs but did not protect non-commercial off-premise signs.

Petitioner also cites *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) as well as the Sixth Circuit's decision in *Déjà vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2002). Both decisions address challenges to adult entertainment licensing schemes, and as such, are inapplicable and do not conflict with *Fort Lauderdale*. The more stringent requirements for licensing schemes do not apply to content-neutral *permitting* schemes which do not target any particular viewpoint or message. *See Thomas.*, 534 U.S. at 320-323 (2002).

review of the cases cited in the Petition does not reveal the type of conflict that warrants review by this Court.[3]

Petitioner cites *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 426-37 (6th Cir. 2005), in support if an alleged conflict. *R.S.W.W.* does not conflict with *Fort Lauderdale* and is clearly distinguishable. In *R.S.W.W.*, the plaintiff, owners of a microbrewery, had applied to change the name on its sign, and the City had postponed consideration of its application. *Id.* at 436-37. The plaintiff sought to challenge the statute on the ground that it granted overly broad licensing discretion which permitted the city to withhold approval of its request to change the name on its sign. *Id.* at 436. The Sixth Circuit Court of Appeals held that it was irrelevant that the city had not yet denied the permit but only delayed consideration of the plaintiff's request and held that the district court had erred in determining that the plaintiff had no standing to challenge the ordinance. *Id.* at 437. *R.S.W.W.* is clearly distinguishable because the plaintiff had applied for a permitted action under the ordinance, and the City had specifically and purposely delayed in considering its permit application.

Additionally, contrary to Petitioner's assertion, the Sixth Circuit's binding case law with regard to standing is entirely consistent with the Eleventh Circuit. On January 22, 2007, the Sixth Circuit Court of Appeals issued its decision in *Prime Media, Inc. v. Brentwood*, 474 F.3d 332, in which it addressed the issue of standing in connection with an attempt to facially challenge an entire municipal sign ordinance. In *Prime Media*, the plaintiff's applications to construct billboards were denied under the City's size, height, and location requirements, and the plaintiff sought to facially challenge numerous other provisions of the regulations under the overbreadth doctrine.

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3. Although Respondent maintains that many of the circuit court decisions cited by Petitioner were incorrectly decided and were not in accord with this Court's prior decisional law, these cases are distinguishable and are not a source of confusion with regard to the Eleventh Circuit's recent standing decisions, including *Fort Lauderdale*.

Id. at 334. Citing this Court's decisions in *Am. Booksellers Ass'n*, 484 U.S. 383 (1988), and *Munson*, the Sixth Circuit concluded that Prime Media did not have standing to challenge any other provisions of the sign regulations, noting that "Prime Media's standing with regard to the size and height requirements does not magically carry over to allow it to litigate other independent provision of the ordinance without a separate showing of an actual injury under those provisions." *Id.* at 338. The court went on to cite, with approval, the Eleventh Circuit's decision in *CAMP*, noting that it "agree[d] with the Eleventh Circuit's approach to this issue, as it follows directly from the Supreme Court's analysis in FW/PBS." *Id.* at 339. Similar to the Eleventh Circuit's conclusion in *Fort Lauderdale*, the Sixth Circuit noted that Prime Media had not demonstrated that it had suffered an injury that would be redressed by a favorable decision. *Id.* at 340.

Petitioner also cites the Third Circuit's decision in *Peachlum v. City of York, Pa.* 333 F.3d 429 (3d Cir. 2003), in support of an alleged conflict. The language cited by Petitioner, however, does no more than recite traditional overbreadth principles as set forth in *Broadrick*. It does not address the relationship between overbreadth and the Article III standing requirements. In *Peachlum*, the Third Circuit concluded that a citizen's challenge to a local ordinance, which prohibited the plaintiff from displaying a yard sign containing an illuminated religious message was ripe for review. *Id.* at 431-32, 435. The court held that the plaintiff could facially challenge the ordinance even though no final administrative decision had been reached with respect to an enforcement action taken against her. *Id.* at 438. Thus, the *Peachlum* decision addressed the ripeness doctrine, and in contrast to *Fort Lauderdale*, involved a private citizen's ability to display a religious message on her own property.

It should also be noted that *Peachlum* was followed by the Third Circuit's 2006 decision in *Service Employees Int'l Union, Local 3 v. Municipality of Mt. Lebanon* in which the court addressed the necessity of the Article III injury-in-fact

requirement. 446 F.3d at 424-25. The Third Circuit concluded that the plaintiff did not have standing to challenge solicitation permitting and canvassing requirements of an ordinance even though they were set forth in the same ordinance under which the plaintiff had suffered injury:

> SEIU argues that we should apply the "relaxed standing principles" used in the First Amendment overbreadth context. But, as noted, those principles are only applicable to prudential standing requirements, *not the constitutional requirements of Article III jurisdiction. We are not free to hear a party's facial challenge to a municipal regulation that is wholly inapplicable the party.* While the canvassing registration requirement and the solicitation permitting requirements are both found within the ordinance, they clearly establish distinct and independent requirements for their application. Overbreadth doctrine effectively allows a party to challenge separate and hypothetical applications of a regulation *only when an otherwise valid application of that same regulation cause the party injury-in-fact. It does not allow a party to challenge a regulation that is wholly inapplicable to the party, regardless of the regulation's location in the statute books.*

Id. (emphasis added). The Third Circuit further noted that its prior decision in *Peachlum*, in no way "relaxed the constitutional requirements for standing." *Id.* at 424, n.2.

The Second Circuit's decision in *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004) is also fails to create a conflict. Unlike Granite State, Lamar set out in its complaint that it was interested in building signs of different sizes, including fifty (50) signs measuring 72-square feet, which would be a size allowed in Orchard Park's

industrial zones.[4] *Id.* at 324. In contrast, Granite State sought permission to construct billboards which were clearly prohibited and did not allege that it sought to erect any of the permitted sign types within the City of Fort Lauderdale. Additionally, subsequent to its decisions in *Lamar* and *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) the Second Circuit has subsequently clarified that even though a facial overbreadth plaintiff must establish that the "challenged regulation injured his or her First Amendment interests," the litigant must still satisfy the Article III injury-in-fact requirement. *Farrell*, 449 F.3d at 498-99 (citing *Munson*, 467 U.S. at 958).

Finally, the *Fort Lauderdale* decision does not conflict with the Ninth Circuit's decision in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). In *Desert Outdoor*, the Ninth Circuit specifically addressed whether the plaintiff had suffered an actual injury-in-fact. In determining that the plaintiff had met the Article III "case" or "controversy" requirements, the court noted that the plaintiff had suffered an injury because the City had brought an enforcement action in order to compel the removal of signs. *Id.* at 818. *Desert Outdoor* is distinct from the circumstances present in *Fort Lauderdale*. The *Desert Outdoor* court was addressing whether the plaintiff needed to apply for a permit to challenge the substantive portion of the sign regulations when it had already been subject to an enforcement action under those same regulations. *Id.* at 818. Moreover, unlike *Fort Lauderdale*, there was no question that Desert Outdoor had suffered injury due to the enforcement of the ordinance (and the forced removal of its signs). *Id.* Desert Outdoor was directly impacted, and thus arguably suffered injury, from a permitting procedure that vested officials with discretion to prohibit any display with a "harmful effect upon

4. The Second Circuit's decision in *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) is similarly distinguishable. In *Babylon*, the Second Circuit spoke in terms of the "speech" that the appellant municipalities sought to "restrict." 900 F.2d at 555. The Second Circuit determined without discussion that the lower court was correct in determining that National had standing to challenge the ordinances.

the health or welfare of the general public." *Id.* at 817. In contrast, Granite State's applications were denied on the basis of a content-neutral, general prohibition of billboards. It was not subject to the type of discretion which impacted Desert Outdoor.

Moreover, in a subsequent 1999 decision, *4805 Convoy, Inc. v. City of San Diego*, the Ninth Circuit clarified that a litigant may not challenge a provision of an ordinance unless it suffers an injury-in-fact from that *particular* provision. In *Convoy*, the Ninth Circuit concluded that the plaintiff had standing to challenge the suspension and revocation provisions of a nude dancing ordinance but did not have standing to challenge the licensing provision of the same ordinance. 183 F.3d at 1111. The court held that the overbreadth exception to the prudential limits on standing "does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury-in-fact to invoke the federal court's jurisdiction." *Id.* at 1112. Because the plaintiff already had a license and could not assert that it would ever again be subject to the licensing provisions, the Ninth Court concluded that the plaintiff failed to demonstrate an injury-in-fact relating to the licensing provisions and therefore lacked standing to challenge those provisions. *Id.* at 1113-1114.

Additionally, as previously noted, case law from the Fourth, Fifth, Eighth, and Tenth Circuits is also in accord with the *Fort Lauderdale* decision. *See Peterson*, 478 F.3d at 633-634 (4th Circuit) (declining facial overbreadth standing to a litigant seeking to challenge the disclosure requirement of an administrative rule because the disclosure requirement "caused him no injury" and noting that overbreadth doctrine "'only assists plaintiffs who have suffered some injury from application of the contested provision to begin with.'" (citing *Gilles v. Torgersen*, 71 F.3d 497, 501 (4th Cir. 1995)); *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Tex.*, 421 F.2d 314, 323 (5th Cir. 2005) (holding that Plaintiffs did not have standing to challenge sign provisions that were "unrelated . . . to activities in which appellants have alleged below and they engaged in."); *Eden Prairie*, 456 F.3d at 800 (8th Cir) (concluding that overbreadth challenge to entirety of sign code failed to lack of

standing and noting that "under no circumstances, however, does the overbreadth doctrine relieve a plaintiff of its burden to show constitutional standing."); *Harp Advertising*, 9 F.3d at 1292-93 (7th Cir) (concluding that an advertising company whose proposed billboard would exceed the size limitations of the sign code did not have standing to challenge the constitutionality of other provisions of the sign and zoning codes); *National Council for Improved Health*, 122 F.3d at 883 (10th Cir) (noting that the overbreadth doctrine "does not eliminate the need for the plaintiff to demonstrate its own cognizable injury-in-fact.). Accordingly, Petitioner has failed to establish that *Fort Lauderdale* conflicts with overbreadth decisions in other circuits, and in fact, no circuit has held that the overbreadth doctrine abrogates the constitutional injury-in-fact requirements.

E. The Eleventh Circuit's Former Overbreadth Jurisprudence Does Not Illustrate Recent Errors.

Petitioner also cites two decisions of the Eleventh Circuit, *National Adver. Co. v. City of Ft. Lauderdale*, 934 F.2d 283 (11th Cir. 1991) and *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), *cert denied* 541 U.S. 1086 (2003) in support of its assertion that the Eleventh Circuit previously permitted the type of broad facial attack at issue in *Granite-Fort Lauderdale*. However, neither *National* nor *St. Petersburg* addressed the constitutional Article III standing requirements. In fact, the *St. Petersburg* decision did not mention the standing doctrine at all. Additionally, in *National-Fort Lauderdale*, the plaintiff was permitted to challenge the constitutionality of the City's prohibition of off-site advertising and exemptions as to certain types of off-site advertising. The court did not accord National standing to engage in a wholesale facial challenge over every provision of the City's sign ordinance; nor did it determine whether National had met the constitutional injury requirement. Moreover, although the Eleventh Circuit's prior decisions in *Fort Lauderdale* and *St. Petersburg* did not specifically address the Article III standing requirements, prior case law from the Eleventh Circuit and the

former Fifth Circuit, decided prior to 1981, and which is still binding within the Eleventh Circuit, did address these issues more specifically than any decision until *Clearwater*.

In *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), a property owner brought suit challenging various provisions of a sign ordinance, including the variance powers of the board of appeals. The Court of Appeals held that the plaintiff did not have standing to challenge those variance powers since he had suffered no real injury. *Id.* at 1514. In *Federal Election Commission v. Lance*, 635 F.2d 1132 (5th Cir. 1981) the Federal Election Commission brought an action to enforce an administrative subpoena. The defendant refused to appear for deposition and challenged the action on the ground that the Federal Corrupt Practices Act, under which the action had been initiated, was unconstitutional. On rehearing *en banc* the Fifth Circuit upheld the validity of the subpoena, concluding that the provisions of the FCPA, which the defendant had standing to challenge, were not facially unconstitutional. *Id.* at 1134. Noting that the defendant's First Amendment attack was directed against Section 441B of the statute as a whole, the court of appeals noted that the "first question we must resolve, then, is whether Lance has standing to challenge the entire statute. We conclude that he does not." The court noted that Section 441B was not written as a single broad injunction, but rather was "a series of discrete, separable prohibitions." The court found that Lance did not have "'such a personal stake' in the constitutionality of any other portion of the Act" to challenge its constitutionality. *Id.* at 1140.

In issuing this decision, the former Fifth Circuit rejected the very same argument put forth by Granite State. In declining to apply the overbreadth doctrine in the case the court noted: "Lance argues not that the prohibition applicable to him is overbroad . . . but that *other prohibitions, tied to the one to which he is subject only by their inclusion in a common statutory scheme*, are unconstitutional." *Id.* at 1141. (emphasis added). Accordingly, the *Fort Lauderdale* decision, is consistent with

the Eleventh Circuit's decisions with regard to proper application of the overbreadth doctrine.

II. The Eleventh Circuit's Opinion Is Not A Departure From The Accepted And Usual Course Of Judicial Proceedings.

A. The Eleventh Circuit's Decision to Issue *Ft. Lauderdale* as an Unpublished Decision was Not an Abuse of the Accepted and Usual Judicial Process.

Subsequent to the issuance of *Tanner* and *CAMP*, the Eleventh Circuit has issued four unpublished decisions, all of which involved attempts by outdoor advertising companies, similar to those in *Clearwater* and *Tanner*, to bring facial challenges to the entirety of sign regulations in an attempt to strike down these ordinances which would otherwise prohibit the construction of billboards. Petitioner makes the bold accusation that in issuing these unpublished decisions, the Eleventh Circuit has attempted "to sweep these four cases 'under the rug' by issuing markedly similar unpublished decisions on a very contentious issue of law . . . ." (17). Petitioner's accusation that the Eleventh Circuit's actions are improper warrants little if any discussion.

The number of unpublished decisions that have followed *Clearwater*, *Tanner*, and *CAMP* relates directly to the number of markedly similar cases that have been filed within the Eleventh Circuit by outdoor advertising companies who seek to circumvent municipal prohibitions of billboards. As part of the scheme to invalidate sign regulations in their entirety, these plaintiffs seek facial invalidation of entire ordinances on the ground that the alleged unconstitutional provisions are not *severable* and that a company who applies for permits under a subsequently invalidated ordinance has a "*vested right*" to issuance of those permits. The hoped for result is to leave no ordinance or regulations in place with which a municipality may deny permits for billboard structures. One district judge in the Eleventh Circuit has described this alarming trend as follows:

> This instant action represents yet another case in what seems to be an ever-increasing trend through which outdoor advertising companies facially challenge municipal ordinances seeking to strike down such ordinances as entirely void. There have been a series of cases by billboard companies across the Eleventh Circuit against municipal zoning ordinances raising the same facial challenges here asserted. Through these actions, advertising companies transform the proverbial First Amendment shield, intended to protect noncommercial speech, into a sword that assures their commercial well-being.

National-Miami, 287 F. Supp. 2d at 1356-1357. Faced with the "ever-increasing trend" noted by the district court cited above, the Eleventh Circuit's decisions in *Clearwater*, *Tanner*, and *Camp* have provided much needed clarity within the Eleventh Circuit with regard to standing and overbreadth, and the Eleventh Circuit's recent unpublished decisions have simply addressed similar cases brought as part of this overall scheme. The Eleventh Circuit's policy is entirely appropriate and facilitates the development of "cohesive" case law.

Finally, it should also be noted that Petitioner's citation to Fed.R.Civ.P. 32.1, as guarding against the attempt to "obscure unpublished decisions," is wholly without merit. Rule 32.1 provides only that courts may not prohibit the citation of unpublished decision.

B. The Eleventh Circuit Did Not Misapply the Established Standard for Motions to Dismiss.

As Petitioner correctly points out, pursuant to Supreme Court Rule 10, a misapplication of Fed.R.Civ.P. 12(b), even had one occurred, would not warrant certiorari review. (15). Moreover, it is apparent that the district court's dismissal of this action was entirely appropriate. In dismissing Granite State's complaint, the District Court accepted as true, all allegations of

the Complaint (12a), including the City's Sign Regulations which were attached, by Granite State, as an exhibit. The District Court properly noted that on motion to dismiss, the court may consider the allegations in the complaint and the allegations in the exhibits attached thereto.

Reviewing the Complaint, the District Court noted that "Granite State asserts that the City denied the applications based on its prohibition of 'outdoor advertising display signs and billboards'. . . ." The District Court further noted that Granite State did not "allege any other actual or threatened injury. . . ." (15a). The District Court, as well as the Eleventh Circuit, based its decisions with respect to standing on the injuries alleged by Granite State in its Complaint. Thus, the District Court properly accepted the factual allegations as true and determined that, based on this Court's standing requirements, the Plaintiff had no standing as a matter of law. The district court was free to reject Granite State's own conclusory allegations of law and unwarranted inferences. *Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997).

The Eleventh Circuit correctly upheld the District Court's dismissal and similarly determined, with regard to Granite State's attempt to challenge provisions under which it had not suffered injury, that "[t]he problem for Granite State it did not allege in its complaint that it intended to engage in any form of expression governed by these provisions of the Sign Ordinance." (7a). Accordingly, the dismissal of Granite State's complaint was wholly appropriate and does not warrant certiorari review by this Court.

CONCLUSION

The Eleventh Circuit's decision correctly determined that Granite State did not have standing to challenge the remaining portions of Fort Lauderdale's sign regulations, under which it suffered no injury. Although legitimate First Amendment concerns are of paramount importance to courts, "plaintiffs must not be allowed to manipulate courts' visceral need to protect the First Amendment. Instead, courts must vigilantly reject arguments intended to pervert that Amendment's primary purpose." *National*, 287 F. Supp. 2d at 1356. The Eleventh Circuit Court of Appeals, in denying standing to the Petitioner, has appropriately and necessarily, continued to alleviate further manipulation of the First Amendment in the Eleventh Circuit. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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